

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

MICHAEL FLATT,)	Case No. DISM-99-0045
)	
Appellant,)	FINDINGS OF FACT, CONCLUSIONS OF
)	LAW AND ORDER OF THE BOARD
v.)	
)	
DEPARTMENT OF SOCIAL AND HEALTH)	
SERVICES,)	
)	
Respondent.)	

I. INTRODUCTION

1.1 Hearing. This appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair; GERALD L. MORGEN, Vice Chair; and LEANA D. LAMB, Member. The hearing was held at Eastern State Hospital, South Conference Room in Medical Lake, Washington, on August 7, 2000.

1.2 Appearances. Appellant Michael Flatt was present and was represented by Anita Hunter, Attorney at Law, of Parr & Younglove, P.L.L.C. Respondent Department of Social and Health Services was represented by Patricia Thompson, Assistant Attorney General.

1.3 Nature of Appeal. This is an appeal from a disciplinary sanction of dismissal for neglect of duty, inefficiency, malfeasance, gross misconduct, and willful violation of published employing agency or department of personnel rules or regulations.

1.4 **Citations Discussed.** WAC 358-30-170; WAC 251-12-240(1); Baker v. Dep't of Corrections, PAB No. D82-084 (1983); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Anane v. Human Rights Commission, PAB No. D94-022 (1995), *appeal dismissed*, 95-2-04019-2 (Thurston Co. Super. Ct. Jan. 10, 1997); Parramore v Dep't of Social & Health Services, PAB No. D94-135 (1995); Rainwater v. School for the Deaf, PAB No. D89-004 (1989); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

II. FINDINGS OF FACT

2.1 Appellant Michael Flatt was an Office Assistant Senior and permanent employee for Respondent Department of Social and Health Services at Eastern State Hospital. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 251 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on August 26, 1999.

2.2 By letter dated July 29, 1999, C. Jan Gregg, Chief Executive Officer of Eastern State Hospital, informed Appellant of his dismissal effective August 16, 1999. Ms. Gregg charged Appellant with neglect of duty, inefficiency, malfeasance, gross misconduct and willful violation of published employing agency or department of personnel rules or regulations. Ms. Gregg alleged that Appellant 1) filed a fraudulent medical/dental insurance enrollment form falsely indicating that he was married, 2) allowed an unauthorized individual into two mailrooms where confidential mail/documents were kept and allowed the same individual to ride in a state vehicle, and 3) was on unauthorized absence when he failed to report to work beginning May 21, 1999 because he was incarcerated.

2.3 Appellant began his employment with Eastern State Hospital in 1988. Appellant has no previous history of disciplinary action. In 1989, Appellant began working in the hospital's mailroom.

1 2.4 In the Spring of 1999, Appellant was convicted for criminal offenses which occurred off-duty
2 and were unrelated to work. He was sentenced to 180 days of incarceration, but he was eligible to
3 participate in a work-release program. In April 1999, Julie Driscoll, Appellant's probation officer,
4 contacted the personnel office at Eastern State Hospital and confirmed that Appellant was employed.
5 Appellant continued to work for the institution while he served his sentence under correctional
6 supervision.

7
8 *Incident #1*

9 2.5 On May 3, 2000, the Board entered an order partially granting Respondent's Motion for
10 Summary Judgment. The Board concluded that no genuine issues of material fact existed regarding the
11 first incident that on November 20, 1997, Appellant knowingly submitted a false medical/dental
12 insurance enrollment form with the intent of obtaining benefits to which he was not legally entitled
13 because he was not married when he completed the forms stating that he was married. The Board
14 further stated that at the hearing on the merits, it would not be necessary for Respondent to prove
15 Appellant's misconduct regarding incident one, however, that the parties should address the issue of the
16 appropriateness of the level of discipline imposed by the appointing authority in this matter.

17
18 2.6 Respondent has adopted Policy 6.04 which addresses Standards of Ethical Conduct for
19 Employees. The policy requires employees to "strengthen public confidence in the integrity of state
20 government by demonstrating the highest standards of personal integrity, fairness, honesty and
21 compliance with laws, rules, regulations and department policies." The policy further states that
22 employees are to "promote an environment of public trust free from fraud, abuse of authority, and
23 misuse of public property."

1 *Incident #2*

2 2.7 Eastern State Hospital has two mailrooms. The Eastlake mailroom is the main mailroom where
3 patient and institution mail is received and sorted. The Eastlake mailroom contains confidential
4 information including mail identifying patient names, legal tender such as checks for patients, and a
5 postage machine. The Westlake mailroom serves as a mail distribution center. Both mailrooms are
6 secured areas and a limited number of staff have authorization to enter them. Appellant was aware that
7 the mailrooms were secure areas and that only authorized personnel were allowed to enter.

8
9 2.8 On May 18, 1999, at approximately 10:30 a.m., Appellant received a visitor at work. Appellant
10 had volunteered to provide his visitor with an application for employment and he escorted her to the
11 personnel office to obtain the documents. Appellant and the visitor then returned to the Eastlake
12 mailroom where the visitor remained outside the mailroom while Appellant entered and obtained a
13 mailbag containing mail for the Westlake mailroom. Appellant and the visitor then boarded an
14 institutional shuttle bus which took them to the building where the Westlake mailroom was located.

15
16 2.9 Appellant admits that the visitor entered the Westlake mailroom with him while he dropped off
17 the mailbag and that she was in the room for approximately 30 to 45 seconds. Appellant then escorted
18 and left his guest with another employee. Appellant returned to the Westlake mailroom where he
19 distributed mail into mailboxes. Appellant returned to where the visitor was waiting, they searched for a
20 job announcement and then left the building. Appellant and the visitor again boarded the institution
21 shuttle bus and returned to the Eastlake mailroom building. Appellant's visitor remained with him until
22 he took his assigned lunch break at 11:30 a.m.

23
24 2.10 Respondent has adopted Policy 1.7 which addresses the Use of the State Resources and
25 Facilities and advises employees, in part, that the use of state time and state vehicles for personal
26 purposes is prohibited. Appellant was aware of this policy.

1
2 2.11 Shirley Maike, Supervisor of mailroom staff, and several other staff testified that it was an
3 occasional practice to allow non-state employees to ride on the hospital shuttle.

4
5 2.12 On May 18, 1999, Ms. Maike initiated a Personnel Conduct Report (PCR) against Appellant
6 alleging that he allowed a visitor to enter the hospital's mailrooms in Eastlake and Westlake and that he
7 allowed her to ride on the state shuttle van.

8
9 *Incident #3*

10 2.13 Respondent initiated a PCR regarding incident one on April 12, 1999. An investigation ensued
11 and on May 19, 2000, Harold Wilson, the Acting Superintendent, entered a finding of misconduct
12 regarding the incident.

13
14 2.14 By letter dated May 20, 1999, Mr. Wilson, informed Appellant that effective immediately,
15 Eastern State Hospital would no longer participate in the work release program. Mr. Wilson explained
16 that the decision was based on "recent allegations of misconduct." The recent allegations to which Mr.
17 Wilson referred included incidents one and two.

18
19 2.15 On May 20, 1999, Ms. Maike called Appellant's probation officer, Julie Driscoll, and informed
20 her that Eastern State Hospital no longer wished to participate in the work release program. Based on
21 this information, Ms. Driscoll initiated an infraction against Appellant for his failure to maintain his
22 employment, one of the conditions necessary for Appellant to continue to participate in the work release
23 program. Appellant was subsequently arrested and incarcerated.

24
25 2.16 May 21, 1999 was a scheduled work day for Appellant. Appellant did not report to work, and
26 did not call his employer to notify his supervisor that he was unable to report to work. Instead,

1 Appellant called his shop steward, Kris Sparks and a family member. Appellant was aware of his duty
2 to call and report his absences to work. Prior to his incarceration, Appellant was able and ready to
3 report to work. Appellant remained incarcerated through August 1999.

4
5 2.17 On June 1, 1999, Ms. Maike initiated a third PCR against Appellant which alleged “since May
6 21, 1999 and continuing until the present, you have been on unauthorized absence.”

7
8 2.18 On June 3, 1999, Ms. Sparks, submitted a response on Appellant’s behalf which denied the
9 allegation of misconduct.

10
11 2.19 On July 6, 1999, Mr. Wilson entered a finding of misconduct against Appellant regarding the
12 third incident.

13
14 2.20 Jan Gregg, Appellant’s appointing authority, scheduled a pre-termination hearing to give
15 Appellant an opportunity to provide additional information regarding the allegations. Appellant did not
16 attend the pre-termination hearing scheduled for August 4, 1999. However, Appellant submitted a
17 written response on July 26, 1999.

18
19 2.21 By letter dated July 29, 1999, Ms. Gregg dismissed Appellant effective August 16, 1999. Ms.
20 Gregg testified that in considering the appropriate level of discipline, she reviewed the results of the
21 three PCRs, the written statement submitted by Appellant, and Appellant’s work history with the
22 department. Ms. Gregg considered Appellant’s actions to be a misuse of his position as a state
23 employee when he filed for double insurance coverage . She considered his actions flagrant, serious and
24 willful. In addition, Ms. Gregg believed that Appellant used a state vehicle for his own personal benefit,
25 allowed an unauthorized individual into the mailroom where confidential information was visible and
26 was absent without authorization. Ms. Gregg further testified that the agency was not required to

1 participate in the work release program and that based on the founded misconduct, the agency ceased its
2 participation in the program.

4 **III. ARGUMENTS OF THE PARTIES**

5 3.1 Respondent argues that Appellant neglected his duty, committed malfeasance, willfully violated
6 policy and that his actions rose to the level of gross misconduct when he filed a fraudulent insurance
7 form in order to get double coverage. Respondent argues that this incident alone warrants termination.
8 Regarding the second incident, Respondent argues that Appellant more likely than not allowed an
9 unauthorized visitor into both mailrooms. Respondent alleges that Appellant neglected his duty, was
10 inefficient and violated Policy 1.7 when he spent more than a *de minimis* amount of time with his
11 visitor, allowed her to enter both the Eastlake and Westlake mailrooms and allowed her to ride in the
12 institution bus. Regarding the third allegation, Respondent argues that Appellant neglected his duty
13 when he failed to call in his absences beginning May 21, 1999. Respondent asserts that it was not aware
14 that participating in the work release program was optional. Respondent argues that following the
15 finding of misconduct regarding incident one and the filing of the PCR regarding incident number two,
16 the appointing authority concluded that it was not appropriate to continue the agency's participation in
17 the work release program. Respondent argues that Appellant was aware of his duty to report his
18 absences and had no legitimate reasons for failing to do so. Respondent argues that it followed the merit
19 system rules in terminating Appellant's employment, that Appellant is untrustworthy, dishonest and
20 lacks credibility. Respondent argues that it has met its burden of proving the allegations, that each
21 incident was serious and that the sanction of dismissal should be affirmed.

22
23 3.2 Regarding the first incident, Appellant argues that Respondent failed to prove that any harm
24 resulted from receiving double insurance coverage and that no evidence was presented to show there
25 was any pay out of benefits by the insurer. Regarding the second incident, Appellant argues that it was
26 not uncommon for employees to receive visitors at work or to put non-state employees on the shuttle.

1 Appellant admits that his visitor entered the Westlake mailroom briefly, but asserts that his visitor did
2 not enter the Eastlake mailroom and that no evidence established that she did so. Appellant argues that
3 he did not neglect his duty nor was he inefficient during the time he spent with his visitor because he
4 continued to perform the duties of his position. Regarding the third incident, Appellant argues that the
5 work release program that his employer entered into with him did not change the employer/employee
6 relationship and that Respondent still had a duty to comply with the merit system rules. Appellant also
7 argues that he was unable to call work because the agency did not accept collect calls and he had no
8 other way of calling work to report his absence. Appellant argues that his employer knew where he was
9 going once they terminated their participation in the work release program and that his employer knew
10 that he had no available leave balances. Appellant argues that termination is too severe particularly in
11 light of his work history.

12 13 IV. CONCLUSIONS OF LAW

14 4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter
15 herein.

16
17 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting the
18 charges upon which the action was initiated by proving by a preponderance of the credible evidence that
19 Appellant committed the offenses set forth in the disciplinary letter and that the sanction was
20 appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of Corrections, PAB
21 No. D82-084 (1983).

22
23 4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her
24 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't of
25 Social & Health Services, PAB No. D86-119 (1987).

1 4.4 Inefficiency is the utilization of time and resources in an unproductive manner, the ineffective
2 use of time and resources, the wasteful use of time, energy, or materials, or the lack of effective
3 operations as measured by a comparison of production with use of resources, using some objective
4 criteria. Anane v. Human Rights Commission, PAB No. D94-022 (1995), *appeal dismissed*, 95-2-
5 04019-2 (Thurston Co. Super. Ct. Jan. 10, 1997).

6
7 4.5 Malfeasance is the commission of an unlawful act, the act of doing what one ought not to do, or
8 the performance of an act that ought not to be done, that affects, interrupts, or interferes with the
9 performance of official duty. Parramore v Dep't of Social & Health Services, PAB No. D94-135
10 (1995).

11
12 4.6 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to carry
13 out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989).

14
15 4.7 Willful violation of published employing agency or institution or Personnel Resources Board
16 rules or regulations is established by facts showing the existence and publication of the rules or
17 regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the rules or
18 regulations. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

19
20 *Incident 1*

21 4.8 Respondent has proven that Appellant neglected his duty to file accurate and truthful
22 information on insurance documents. Appellant's actions of submitting medical/dental forms containing
23 fraudulent information demonstrate a lack of personal integrity and honesty. Appellant's actions were
24 egregious, harmed his credibility and undermined the trust Respondent placed in him. Respondent has
25 proven that Appellant's misconduct rises to the level of gross misconduct and constitutes malfeasance
26 and violated the state's ethics policy.

1
2 *Incident 2*

3 4.9 Respondent has proven that Appellant neglected his duty and was inefficient when he spent
4 more than an insignificant amount of time with his visitor during work time. Respondent has also
5 proven that Appellant neglected his duty to ensure the security of the Westlake mailroom when he
6 allowed his visitor to enter the mailroom where confidential information was readily visible.
7 Respondent has failed to prove that the visitor entered the Eastlake mailroom. Furthermore, Respondent
8 has failed to prove that Appellant neglected his duty or violated agency policy when he allowed a non-
9 state employee to ride on the institution shuttle bus. Although Respondent's policy prohibits the use of
10 state-owned vehicles for personal purposes, credible testimony established that use of the shuttle by
11 non-state employees did occur.

12
13 *Incident 3*

14 4.10 The third allegation cited by Respondent in support of Appellant's termination stems from
15 Appellant's absence from work beginning May 21, 1999. There is no question that Appellant was
16 available to report to work and that he continued to work for Respondent while he was under
17 correctional supervision. Although the state civil service laws do not address work release programs,
18 participation in such a program does not sever the employer/employee relationship or an agency's
19 obligation to follow the merit system rules when imposing disciplinary action against an employee. The
20 merit system rules governing disciplinary actions (Chapter 356-34 WAC) permit appointing authorities
21 to impose sanctions including demotion, suspension, reduction in salary or dismissal after giving notice
22 of the specified charges to the employee in writing.

23
24
25 4.11 Here, the agency investigated the most serious allegation, that of insurance fraud, while
26 Appellant continued to be present at work. A finding of misconduct was entered by the appointing

1 authority on May 19, 1999. The following day, based on this finding and the subsequent initiation of a
2 PCR regarding incident number two, Respondent informs Appellant and his probation officer that it no
3 longer wishes to participate in the work release program. Appellant is incarcerated and, as a result, he
4 becomes unable to report to work on May 21, his next regularly scheduled work day.

5
6 4.12 Respondent proceeds to charge Appellant with neglect of duty for his inability to report to work
7 and for neglecting his “duty to be present for work as scheduled, on time and in a condition fit for work
8 every period of scheduled work.” There is no question that Appellant met these conditions prior to May
9 21. It is contrary to the spirit of the merit system rules for the appointing authority to use Appellant’s
10 inability to report work, which was caused by its decision to cease its participation in the work release
11 program, as a basis to terminate Appellant. In this case, the appointing authority should have placed
12 Appellant on administrative leave pending a determination on the level of discipline regarding the first
13 incident and the outcome of an investigation into the second PCR.

14
15 4.13 In determining whether a sanction imposed is appropriate, consideration must be given to the
16 facts and circumstances, including the seriousness and circumstances of the offenses. The penalty
17 should not be disturbed unless it is too severe. The sanction imposed should be sufficient to prevent
18 recurrence, to deter others from similar misconduct, and to maintain the integrity of the program. An
19 action does not necessarily fail if one cause is not sustained unless the entire action depends on the
20 unproven charge. Holladay v. Dep’t of Veterans Affairs, PAB No. D91-084 (1992).

21
22 4.14 Respondent has failed to meets its burden on a significant number of the allegations, and the
23 proven facts surrounding the second incident do not warrant termination. Nevertheless, the egregious
24 nature of an employee submitting fraudulent information to obtain medical/dental benefits warrants
25 dismissal. An employer has the right to expect its employees to be honest and forthright in all dealings,
26 especially when submitting documents which certify eligibility information. Whether Appellant

1 received any pay out of benefits is irrelevant and does not mitigate his misconduct. The sanction of
2 dismissal should be not disturbed as too severe even when considering Appellant's history with the
3 agency and the lack of any prior formal or informal disciplinary action.

4
5 4.15 Respondent's disciplinary sanction of dismissing Appellant should be affirmed and the appeal
6 should be denied.

7
8 **V. ORDER**

9 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Michael Flatt is denied.

10
11 DATED this _____ day of _____, 2000.

12
13 WASHINGTON STATE PERSONNEL APPEALS BOARD

14
15 _____
16 Walter T. Hubbard, Chair

17
18 _____
19 Gerald L. Morgen, Vice Chair

20
21 _____
22 Leana D. Lamb, Member